

Civil No. 11-2114 (GAG)

1 pertinent law, the court **DENIES** both motions for summary judgment.

2 **I. Standard of Review**

3 Summary judgment is appropriate when “the pleadings, depositions, answers to
4 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
5 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter
6 of law.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). See FED. R. CIV. P. 56(a). “An issue
7 is genuine if ‘it may reasonably be resolved in favor of either party’ at trial, and material if it
8 ‘possess[es] the capacity to sway the outcome of the litigation under the applicable law.’” Iverson
9 v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006) (alteration in original) (internal citations omitted).
10 The moving party bears the initial burden of demonstrating the lack of evidence to support the non-
11 moving party’s case. Celotex, 477 U.S. at 325. “The movant must aver an absence of evidence to
12 support the nonmoving party’s case. The burden then shifts to the nonmovant to establish the
13 existence of at least one fact issue which is both genuine and material.” Maldonado-Denis v.
14 Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). The nonmovant may establish a fact is
15 genuinely in dispute by citing particular evidence in the record or showing that either the materials
16 cited by the movant “do not establish the absence or presence of a genuine dispute, or that an adverse
17 party cannot produce admissible evidence to support the fact.” FED. R. CIV. P. 56(c)(1)(B). If the
18 court finds that some genuine factual issue remains, the resolution of which could affect the outcome
19 of the case, then the court must deny summary judgment. See Anderson v. Liberty Lobby, Inc., 477
20 U.S. 242, 248 (1986).

21 When considering a motion for summary judgment, the court must view the evidence in the
22 light most favorable to the non-moving party and give that party the benefit of any and all reasonable
23 inferences. Id. at 255. Moreover, at the summary judgment stage, the court does not make
24 credibility determinations or weigh the evidence. Id. Summary judgment may be appropriate,
25 however, if the non-moving party’s case rests merely upon “conclusory allegations, improbable
26 inferences, and unsupported speculation.” Forestier Fradera v. Mun. of Mayaguez, 440 F.3d 17, 21

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1 (1st Cir. 2006) (quoting Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003)).

2 “Cross-motions for summary judgment do not alter the summary judgment standard, but
3 instead simply require [the court] to determine whether either of the parties deserves judgment as
4 a matter of law on the facts that are not disputed.” Wells Real Estate Inv. Trust II, Inc. v.
5 Chardon/Hato Rey P’ship, S.E., 615 F.3d 45, 51 (1st Cir. 2010) (citing Adria Int’l Group, Inc. v.
6 Ferré Dev. Inc., 241 F.3d 103, 107 (1st Cir. 2001)) (internal quotation marks omitted). Although
7 each motion for summary judgment must be decided on its own merits, each motion need not be
8 considered in a vacuum. Wells Real Estate Inv. Trust II, Inc., 615 F.3d at 51 (quoting P.R. American
9 Ins. Co. v. Rivera-Vázquez, 603 F.3d 125, 133 (1st Cir. 2010)) (internal quotation marks omitted).
10 “Where, as here, cross-motions for summary judgment are filed simultaneously, or nearly so, the
11 district court ordinarily should consider the two motions at the same time, applying the same
12 standards to each motion.” Wells Real Estate Inv. Trust II, Inc., 615 F.3d at 51 (quoting P.R. Am.
13 Ins. Co. v. Rivera-Vázquez, 603 F.3d 125, 133 (1st Cir. 2010)) (internal quotation marks omitted).

14 **II. Relevant Factual Background**

15 Plaintiff was twice employed by Perfect over a span of eight years. (See Docket Nos. 42-2
16 ¶ 3; 54-1 ¶ 3.) In the morning of September 23, 2010, Plaintiff was part of the Perfect crew working
17 as an ornament and maintenance worker on Roosevelt Avenue. (See Docket Nos. 42-2 ¶ 4; 54-1 ¶
18 4.) While working near the intersection of Roosevelt Avenue and Matadero Street, Plaintiff was
19 struck by a United States Postal Service vehicle driven by Ramirez. (See Docket Nos. 42-2 ¶ 4; 54-1
20 ¶ 4.) No traffic cones or warning signs were placed along the roadway leading to Plaintiff’s location
21 in order to alert oncoming vehicles. (See Docket Nos. 42-2 ¶ 5; 54-1 ¶ 5.) The actual contact
22 occurred between the equipment Plaintiff was using and the vehicle’s passenger side mirror. (See
23 Docket Nos. 42-2 ¶ 6; 54-1 ¶ 6.)

24 Plaintiff’s location and actions are at the heart of this controversy. According to Plaintiff,
25 she was standing on the gutter, inside the curb and outside of the roadway. (See Docket No. 54-3
26 at 23.) While she was working, Plaintiff kept an eye on the traffic. (See Docket No. 54-3 at 21.)

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1 Once the traffic light turned green, she saw the Postal Service vehicle accelerate and run into a
2 pothole. (See Docket No. 54-3 at 20.) As the vehicle approached, she moved to the inside of the
3 road as much as possible. (See Docket No. 54-3 at 21-23.)

4 Defendant tells a different tale. Defendant claims Plaintiff was working in the road and did
5 not move outside of the roadway when she saw the vehicle approaching. (See Docket Nos. 54-3 at
6 21.) In fact, Defendant points to Ramirez’s testimony that Plaintiff was working in the middle of
7 the road and as he approached, she stepped further into the road to cause contact with the Postal
8 Service vehicle. (See Docket No. 42-4 at 2.) In this scenario, Plaintiff was not only in the road, but
9 moved further into oncoming traffic, not towards the shoulder as Plaintiff states.

10 In either version, after the accident the driver and Plaintiff spoke, and Plaintiff received
11 treatment at the State Insurance Fund. (See Docket Nos. 42-2 ¶ 7; 54-1 ¶ 7.) The parties dispute
12 a number of facts pertaining to Perfect, but those facts are not determinative of the outcome of the
13 present motions.

14 **III. Discussion**

15 Ultimate determination of liability in this case rests on how the jury interprets the testimony
16 of Plaintiff and Ramirez. As each party has their own account of the operative facts, a jury must
17 determine which facts to believe; therefore, summary judgment is denied.

18 Plaintiff brings this claim pursuant to the FTCA, which allows claims:

19 for money damages . . . for injury or loss of property, or personal injury or
20 death caused by the negligent or wrongful act or omission of any employee
21 of the Government while acting within the scope of his office or employment,
22 under circumstances where the United States, if a private person, would be
23 liable to the claimant in accordance with the law of the place where the act
24 or omission occurred.

25 28 U.S.C. § 1346(b)(1). As the statute states, courts apply the law of the jurisdiction in which the
26 act took place -in this case is Puerto Rico. Gonzalez-Rucci v. U.S. I.N.S., 539 F.3d 66, 69 (1st Cir.
27 2008). Puerto Rico’s general negligence statute states, “A person who by an act or omission causes
28 damage to another through fault or negligence shall be obliged to repair the damage so done.
Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction

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1 of the indemnity.” P.R. LAWS ANN. tit. 31, § 5141. See Diaz Aviation Corp. v. Airport Aviation
2 Servs., Inc., No. 12–1859, 2013 WL 2680606, at *7 (1st Cir. June 14, 2013). This has been
3 interpreted to require a plaintiff to demonstrate: “(1) a duty requiring the defendant to conform to
4 a certain standard of conduct, (2) a breach of that duty, (3) proof of damage, and (4) a causal
5 connection between the damage and the tortious conduct.” Woods-Leber v. Hyatt Hotels of P.R.,
6 Inc., 124 F.3d 47, 50 (1st Cir. 1997) (citing Sociedad de Gananciales v. Gonzalez Padin, 17 P.R.
7 Offic. Trans. 111, 125 (1986)).

8 Plaintiff further argues that Puerto Rico has codified a number of duties drivers owe to
9 pedestrians.

10 The speed of a vehicle or motor vehicle shall be regulated all times with due
11 care, taking into account the width, traffic, use and condition of the public
12 highway. No one shall drive at a speed greater than that which allows the
13 driver to exercise proper control of the vehicle and shall reduce its speed or
14 stop when needed to prevent an accident. Pursuant to the requirements stated
15 above, every person shall drive at a safe and adequate speed when
16 approaching and crossing an intersection or railroad crossing, when
17 approaching the summit of a slope, when traveling on a narrow or winding
18 road or when there is special danger to pedestrians or other traffic, or due to
19 the weather or the condition of the public highway.

20 P.R. LAWS ANN. tit. 9, § 5121. Of particular importance, the law provides protections for
21 pedestrians, even when the pedestrian is improperly in the road. See P.R. LAWS ANN. tit. 9, § 5253.

22 Any person who drives a vehicle on the public roads shall be bound to . . .
23 [t]ake the proper precautions so as not to injure any pedestrian, with special
24 precautions when the pedestrians are children, or elderly or disabled persons.
25 These precautions shall be taken even when the pedestrian is improperly or
26 illegally using the public road. The use of the horn, alone, shall not relieve the
27 driver from liability if other safety measures are not taken.

28 Id. Similarly, pedestrians owe a duty to vehicular traffic:

29 Pedestrians shall only walk on the sidewalks, and if there are none, whenever
30 it is possible and practical, shall walk on the curb or left hand side of the
31 public road facing traffic and shall not leave the same unexpectedly and
32 rapidly when a vehicle is so close that it is impossible for the driver to yield
33 right of way. In the case of funeral processions on foot, pedestrians shall
34 walk on the right side of the public road using no more than half of the
35 roadway.

36 P.R. LAWS ANN. tit. 9, § 5252(f). The Puerto Rico Supreme Court previously held that the right of
37 way enjoyed by a driver does not allow the driver to simply hit any pedestrian who improperly enters
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1 the road. See Viuda de Vila v. Guerra Mondragon, 107 D.P.R. 418, 425, 7 P.R. Offic. Trans. 463
2 (1978). According to the law, both parties owe a duty to each other.

3 The contested facts will determine whether Plaintiff ultimately succeeds. Under Plaintiff's
4 version of the facts, Defendant breached this duty, Plaintiff suffered damages, and those damages
5 were proximately caused by Defendant's breach of that duty. However, the jury could find the
6 opposite, that Defendant did not breach its duty or that it did breach its duty, but also that Perfect
7 or Plaintiff or both were negligent and the fault must be apportioned between the culpable parties.

8 Pursuant to the law above, Defendant's motion for summary judgment must be denied.
9 Viewing the facts in the light most favorable to Plaintiff, she was performing work on the inside
10 shoulder of the roadway when Ramirez drove towards her, saw her, attempted to drive past her, and
11 struck her with his vehicle. Such a scenario allows for Plaintiff to recover from Defendant.
12 Similarly, Plaintiff's counter motion for summary judgment must also be denied. Viewing the facts
13 in the light most favorable to Defendant, Plaintiff was working in the middle of the road, as Ramirez
14 approached, Plaintiff moved further into the road and struck Defendant's vehicle. Under these facts,
15 Defendant may be absolved from liability, or may at least convince a jury to apportion the fault
16 between Plaintiff and Perfect, thereby lessening its own liability. As the factual determinations will
17 be determinative, the court must deny both motions for summary judgment.

18 **IV. Conclusion**

19 For the aforementioned reasons, the court **DENIES** Defendant's motion for summary
20 judgment (Docket No. 42) and **DENIES** Plaintiff's motion for summary judgment (Docket No. 54).

21 **SO ORDERED**

22
23 In San Juan, Puerto Rico this 25th day of June, 2013.

24 *S/Gustavo A. Gelpí*

25 GUSTAVO A. GELPÍ

26 United States District Judge